IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2020

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.519 of 2015
and
M.P.No.1 of 2015

The Divisional Manager, Divisional Office,
The New India Assurance Co. Ltd.,
Big Bazaar Street, Tiruvannamalai.
... Appellant/4th Respondent

Vs.

1.D.Udayakumar @ Kumar ... Respondent/Petitioner

2.Mathiarasan
(Set exparte before the Tribunal)
... Respondent/1st Respondent

3.The General manager,
Reliance General Insurance Co. Ltd.,
Unit No.1st 3rd Floor, No.23, Spur Tank Road,
Chetpet, Chennai.

.. Respondent/2nd Respondent

4.Prakash (inclaimed) ... Respondent/
3rd Respondent

(2nd respondent remained exparte)

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 23.06.2014 made in M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.C.O.P.No.426 of 2012) on the file of Motor Accidents Claims Tribunal, (Special Court for Motor Accidents Claims Cases) at Tirupattur.

For Appellant : Mr.M.Krishnamoorthy

For R1 : Mr.F.Terry Chella Raja
for M/s.M.Malar

For R3 : Mr.S.Arunkumar

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company challenging the award dated 23.06.2014 made in M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.C.O.P.No.426 of 2012) on the file of Motor Accidents Claims Tribunal, (Special Court for Motor Accidents Claims Cases) at Tirupattur.

2.The appellant/Insurance Company is the 4th respondent in M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.C.O.P.No.426 of 2012) on the file of Motor Accidents Claims Tribunal, (Special Court for Motor Accidents Claims Cases) at Tirupattur. The 1st respondent filed the said claim petition claiming a sum of Rs.5,00,000/- as compensation for the injuries sustained by him in a road accident that took place on 29.12.2009.

3.The appellant, who is 4th respondent in the claim petition, is insurer of the lorry bearing Registration No. TN 28 F 4053 driven by the 1st respondent/claimant. According to the 1st respondent/claimant, while he was driving the lorry on 29.12.2009 from Vellore to Ambur and observing the traffic rules and when he was proceeding near Vengili village, another lorry bearing Registration No. TN 30 R 0964 belonging to the 2nd respondent insured with the 3rd respondent suddenly applied break and stopped the lorry without any signal. The 1st respondent who was driving his lorry, behind the lorry bearing Registration No. TN 30 R 0964 could not stop the lorry and dashed against the lorry belonging to the 2nd respondent. According to the 1st respondent, the accident has occurred only due to negligence on the part of the driver of the 2nd respondent and claimed compensation.

4.The 2nd respondent/owner of the lorry bearing Registration No.TN 30 R 0964 remained exparte before the Tribunal.

5.The 3rd respondent/Reliance General Insurance Company Ltd. filed counter statement denying the averments made by the 1st respondent and contended that the lorry bearing Registration No. TN 30 R 0964 was not insured with the 3rd respondent at the time of accident. The accident has occurred only due to rash and negligent driving by the driver of the lorry bearing Registration No. TN 28 F 4053. The 1st respondent has to claim compensation against his own Insurance Company under Workmen Compensation Act. The 1st respondent has to prove the age, avocation and income. The 1st respondent sustained only simple injuries. The amount claimed by the 1st respondent is very high and the petition is liable to be dismissed.

6.The 4th respondent/owner of the lorry bearing Registration No. TN 28 F 4053 filed counter statement and contended that the lorry was driven by the 1st respondent. The accident had occurred only due to sudden stopping of the lorry bearing Registration No. TN 30 R 0964 belonging to the 2nd respondent and insured with the 3rd respondent/Reliance General Insurance Company. Therefore, the respondents 2 & 3 are liable to pay compensation to the 1st respondent and prayed for dismissal of the claim petition as against the 4th respondent and the appellant.

7.The appellant/New India Assurance Company Ltd filed counter statement denying the averments made by the 1st respondent and contended that the accident has occurred only due to rash and negligent driving by the driver of the lorry bearing Registration No. TN 30 R 0964. The 1st respondent did not possess valid driving license at the time of accident. FIR was registered against the 1st respondent for rash and negligent driving. The 1st respondent being a tortfeasor cannot claim any compensation. Hence, the appellant/New India Assurance Company Ltd. is not liable to pay any compensation.

8.Before the Tribunal, the 1st respondent, examined himself as P.W.1 and one Dr.Selvanathan was examined as P.W.2 and marked seventeen documents as Exs.P1 to P17. On the side of the appellant/Insurance Company, one Sampath/officer of the New India Assurance Company Ltd was examined as R.W.1 and marked one document as Ex.R1.

9.The Tribunal, considering the pleadings, oral and documentary evidence, held that neither the 1st respondent who was driving the lorry bearing Registration No. TN 28 F 4053 nor the driver of the lorry bearing Registration No. TN 30 R 0964 was responsible for the accident and considering the terms of policy issued by the appellant which covers paid driver of the 3rd respondent, directed the appellant/New India Assurance Company to pay a sum of Rs.1,27,100/- as compensation to the 1st respondent and dismissed the claim petition as against the respondents 2 & 3.

10.Challenging the liability fixed by the Tribunal in the award dated 23.06.2014 made in M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.c.O.P.No.426 of 2012), the appellant/New India Assurance Company Ltd. has come out with the present appeal.

11.The learned counsel appearing for the appellant/New India Assurance Company Ltd. contended that the Tribunal having held that both the drivers are not responsible for the accident, erred in entertaining the claim petition filed by the 1st respondent under Section 166 of the Motor Vehicles Act, 1988.

The claimant has to prove the negligence and then only can maintain the claim petition under Section 166 of the Motor Vehicles Act, 1988. The Tribunal erred in overlooking the fact that the 1st respondent pleaded and proved negligence only on the part of the driver of the lorry bearing Registration No. TN 30 R 0964 insured with the 3rd respondent/Reliance General Insurance Company Ltd. The 1st respondent has pleaded and deposed that while he was driving the lorry bearing Registration No. TN 28 F 4053, the driver of the lorry bearing Registration No. TN 30 R 0964 belonging to the 2nd respondent proceeding in front of the 1st respondent lorry suddenly applied break without any indicator and caused the accident. The Tribunal failed to note that the respondents 2 & 3 did not let in any evidence to disprove the evidence of 1st respondent as PW1. In the absence of any contra evidence, the Tribunal ought to have fixed entire negligence on the part of the driver of the lorry bearing Registration No. TN 30 R 0964 belonging to the 2nd respondent and fastened the liability on the respondents 2 & 3. The Tribunal erred in directing the appellant to pay compensation and prayed for allowing the appeal. In support of his contentions, he relied on the following judgements:

a) "Civil Appeal No.5906 of 2008" in the case of "Pawan Kumar and another etc. Vs M/s.Harikrishnan Dass Mohan Lal and Others":

> "7.Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence."

b) "Civil Appeal No.3991 of 2003 [Arising out of SLP (Civil) No.16977 of 2002) dated 06.05.2003" in the case of "Tamil Nadu State Transport Corporation, M/s.Tanjore Vs Natarajan":

> "9.From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of the Madras High Court in its impugned order imposing liability to the extent of 50% on the appellant/Corporation. The Division Bench of the High Court completely over-looked that the claimant himself as driver of the Corporation bus and was found negligent

to the extent of 50% for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the Corporation bus, the Corporation as an employer cannot be held to be vicariously liable for the negligence of the claimant himself. The claim petition did not make the Corporation as a party to the claim obviously because the claimant exercised option of approaching the Claims Tribunal under the Motor Vehicles Act against the owner and insurer of the private bus. He did not file any claim under the Workmen Compensation Act against the employer. Since the Corporation was not at fault and the accident was caused because of the contributory negligence of the drivers of both the buses, the Corporation could not be held liable under the provision of Motor Vehicles Act. It was not a claim based on 'no fault liability'. It was a claim petition filed by the claimant against the owner and insurer of the private bus. The claimant is also represented before us and on his behalf it is stated that he has been given compassionate appointment on suitable alternative job and he never desired to obtain any other compensation from his employer. The Division Bench of the High Court therefore committed a serious error in apportioning and fastening 50% liability of compensation on the appellant/Corporation. This part of the award therefore deserves to be set aside. The liability of the respondent/insurance company as insurer of private bus is found to be only to the extent of 50% of the total compensation determined. The total compensation determined is Rs.2,09,800/- (Rupees two lakh nine thousand and eight hundred) only. Fifty per cent liability of the insurer of the private bus would therefore be Rs.1,04,900/- (Rupees one lakh four thousand and nine hundred) only. On the aforesaid amount, the claimant would be entitled to an interest rate at 9% per annum from the date of filing the claim petition as awarded."

c) "Civil Appeal No.7381 of 2005 [Arising out of SLP (Civil) No.26615 of 2004) dated 09.12.2005" in the case of

"National Insurance Company Vs Mastan & Another":

"29.Mr. P.R. Ramasesh is not correct in contending that both the Acts should be read together. A party suffering an injury or the dependents of the deceased who has died in course of an accident arising out of use of a motor vehicle may have claims under different statutes. But when cause of action arises under different statutes and the claimant elects the forum under one Act in preference to the other, he cannot be thereafter permitted to raise a contention which is available to him only in the former.

33.On the establishment of a Claims Tribunal in terms of Section 165 of the Motor Vehicles Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of Section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the Civil Court to entertain a claim for compensation arising out of a motor accident, stands ousted by Section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the Civil Court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That Section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf, being with the victim or his representative. But Section 167 makes it clear that a claim could no be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation both under the Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the concerned forum. By confining the claim to the authority or Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis is the Section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of two alternative tribunals are open to a litigant, each having jurisdiction over the matters in dispute, and he resorts for his remedy to one of such tribunals in preference to the latter" (see R.V. Evans (1854)3 E & B 363] is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The caimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognised in Section 167 of the Motor Vehicles Act.

34.On the language of Section 167 of the Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988 other than what is specifically saved by Section 167 of the Act. Section 167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as 'no fault' liability in case of an accident. Section 140 of the Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle.

Sections 141 and 142 deal with particular claims on the basis of no fault liability and Section 143 re-emphasizes what is emphasised by Section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988 overriding effect."

d) "(2012) 4 SCC 552" in the case of "Surender Kumar Arora and another Vs Manoj Bisla and others":

"9. ...... Secondly, the deceased was employed in a limited company. It was necessary for the claimants to establish what was the monthly income and what was the dependency on the basis of which the compensation could be adjudged as payable. Should not any Tribunal trained in law ask the claimants to produce evidence in support of the monthly salary or income earned by the deceased from his employer Company? Is there anything in the Motor Vehicles Act which stands in the way of the Tribunal asking for the best evidence, acceptable evidence? We think not. Here again, the position that the Motor Vehicles Act vis-'-vis claim for compensation arising out of an accident is a beneficent piece of legislation, cannot lead a Tribunal trained in law to forget all basic principles of establishing liability and establishing the quantum of compensation payable. The Tribunal, in this case, has chosen to merely go by the oral evidence of the widow when without any difficulty the claimants could have got the employer \026 company to produce the relevant documents to show the income that was being derived by the deceased from his employment. Of course, in this case, the above two aspects become relevant only if we find the insurance company liable. If we find that only the owner of the vehicle, the employer of the deceased was liable, there will be no occasion to further consider these aspects since the owner has acquiesced in the award passed by the Tribunal against it.

24.We think that the law laid down in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.”

12.The learned counsel appearing for the 3rd respondent/ Reliance General Insurance Company Ltd. contended that the driver of the lorry belonging to the 2nd respondent was not negligent and responsible for the accident. The 1st respondent who was driving his lorry behind the lorry of the 2nd respondent dashed against the lorry bearing Registration No. TN 30 R 0964 and caused the accident. FIR is registered only against the 1st respondent. The 1st respondent or 4th respondent have not proved negligence on the part of the driver of the lorry belonging to the 2nd respondent. The Tribunal considering the terms of policy issued by the appellant has fixed entire liability on the appellant which is valid and prayed for dismissal of the appeal. In support of his contentions, he relied on the following judgements:

(a) "(1996) ACJ 555" in the case of "K.Nandakumar Vs Managing Director, Thanthai Periyar Transport Corporation Ltd":

> "8.The appellant is entitled to the benefit of the provisions of Section 92-A and to compensation on the sum of Rs.7,500/-, as quantified therein for permanent disability.
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> 9.The appeal is allowed. The judgment and order under appeal is set aside. The respondent shall pay to the appellant compensation in the sum of Rs.7,500/- with interest thereon at the rate of 12 per annum from the date of the appellant's claim petition till payment or realization."

(b) "(2018)1 TN MAC 745 (SC)" in the case of "Nishan Singh and others Vs Oriental Insurance Co. Ltd. and others":

> "13. However,even in such a case,the Tribunal could have been well advised to invoke Section 140 of the Motor Vehicles Act,1988,(for short "the Act") providing for liability of the owner of the vehicle(subject truck) involved in the accident. It is a well settled position that fastening liability under Section 140 of the Act on the owner of the vehicle is regardless of the fact that the subject vehicle was not driven rashly and negligently. We may usefully refer to the decisionsin Indra Devi and others Vs. Bagada Ram and another1 and Eshwarappa alias Maheshwarappa and Another Vs. C.S. Gurushanthappa and Another2 ,which are directly on the point.

14. Accordingly,even though the appeal fails insofar as claim petition under Section 166 of the Act, for the appellants having failed to substantiate the factum of rash and negligent driving by the driver of the subject truck,the appellants must succeed in this appeal to the limited extent of relief under Section 140 of the Act. We have no hesitation in moulding the relief on that basis."

13.The learned counsel appearing for the 1st respondent/claimant contended that the Tribunal after considering the materials available on record, has rightly directed the appellant/New India Assurance Company Ltd. to pay compensation. The amounts awarded by the Tribunal under different heads are not excessive and prayed for dismissal of the appeal. In support of his contentions, he relied on the following judgements:

(a) "2013(1) TN MAC 530" in the case of "D.Selvasrasu Vs D.Rajamanickam 2.V.Murugan":

30. In claim cases, while adjudicating the aspect of negligence, the tribunal/ court cannot simply reject the claim petition solely on the basis of a police officer's report. The manner, in which, the report has been filed by the Investigating officer, speaks for itself, as to how the tortfeasor, has been aided by a police officer, to extricate him from payment of compensation, particularly, when the vehicle involved did not have an insurance and that the offending Motorcyclist did not possess a valid and effective driving licence, at the time of accident. Mistake of fact recorded by RW1, Sub- Inspector of police would not preclude the Claims Tribunal from adjudicating the aspect of negligence and consequently, compute the compensation to be paid to the legal heirs of the deceased/injured, involving the use of a Motorcycle. In the light of the evidence/ material on record, this court is of the view that the finding of the Tribunal, fixing negligence on the rider of the Motorcycle, Hero Hondo Splendor, cannot be said to be perverse or without any evidence."

14.Heard the learned counsel appearing for the appellant-Insurance Company as well as the learned counsel appearing for the 1st respondent and the learned counsel appearing for the 3rd respondent and perused the entire materials on record.

15.From the materials available on record, it is seen that there are two vehicles involved in the accident. The lorry belonging to the 2nd respondent bearing Registration No. TN 30 R 0964 was proceeding in front of the lorry driven by the 1st respondent. It is not in dispute that the driver of the lorry belonging to the 2nd respondent stopped the vehicle and the 1st respondent dashed on the back side of the said lorry. The Tribunal considering the evidence let in before it, held that the driver of the lorry belonging to the 2nd respondent stopped the vehicle to enable two persons to get into the lorry. There is no evidence to show that the driver of the lorry belonging to the 2nd respondent stopped the vehicle after giving signal or giving any intimation that he is going to stop the vehicle. The respondents 2 & 3 did not examine the driver of the lorry belonging to the 2nd respondent or any eyewitness to disprove the evidence of 1st respondent as PW1. The reason given by the Tribunal that both the drivers were not negligent and not responsible for the accident is erroneous. The Tribunal failed to consider the evidence of the 1st respondent that the driver of the lorry bearing Registration No. TN 30 R 0964 belonging to the 2nd respondent suddenly applied break and stopped without any intimation and that the respondents 2 & 3 have not let in any evidence to disprove the same. At the same time, it is to be taken note that the 1st respondent who was driving the vehicle behind another lorry ought to have been cautious and careful by keeping safe distance.

16.In view of the above facts, I hold that both the drivers are negligent and equally responsible for the accident. Both the appellant and respondents 2 to 4 are equally liable to pay compensation. As per policy issued by the appellant, premium is paid for payment of compensation for paid driver. The 4th respondent is the owner of the lorry driven by the 1st respondent and in the counter statement, he had admitted that the 1st respondent is paid driver. In view of the same, the contention of the learned counsel for the appellant that the appellant is not liable to pay any compensation for negligence of the 1st respondent cannot be accepted. The appellant did not deny the terms of policy and RW1 admitted the policy.

17.In view of the above conclusion, both appellant as well as respondents 2 to 4 are equally liable to pay compensation as awarded by the Tribunal. The appellant and 4th respondent, being the insurer and owner of the lorry bearing Registration No.TN 28 F 4053 are liable to pay 50% of the compensation and the respondents 2 and 3, being the owner and insurer of the lorry bearing Registration No.TN 30 R 0964 are liable to pay 50% of the compensation awarded by the Tribunal. Both the appellant-New India Assurance Company and 3rd respondent-Reliance General Insurance Company are directed to deposit 50% each of the compensation awarded by the Tribunal.

18.In the result, this Civil Miscellaneous Appeal is partly allowed and sum of Rs.1,27,100/- awarded by the Tribunal as compensation to the 1st respondent/claimant, along with interest and costs is confirmed. The appellant-New India Assurance Company and 3rd respondent-Reliance General Insurance Company are directed to deposit a sum of Rs.63,550/- each being 50% of the award amount along with proportionate interest and costs, less the amount already deposited, if any, within a period of six weeks from the date of receipt of a copy of this judgment to the credit of M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.C.O.P.No.426 of 2012) on the file of Motor Accidents Claims Tribunal, (Special Court for Motor Accidents Claims Cases) at Tirupattur. On such deposit, the 1st respondent/claimant is permitted to withdraw the award amount along with interest and costs, less the amount if any, already withdrawn by making necessary applications before the Tribunal. The appellant-Insurance Company is at liberty to withdraw the excess amount if any already deposited to the credit of M.C.O.P.No.1 of 2013 (Sub Court, Tirupattur M.C.O.P.No.284 of 2010) (III Additional Court, Tirupattur M.C.O.P.No.426 of 2012) on the file of Motor Accidents Claims Tribunal, (Special Court for Motor Accidents Claims Cases) at Tirupattur. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(I)

//True Copy//

Sub Assistant Registrar

mtl

To

1. The Special Court for
Motor Accident Claims Tribunal,
Tirupattur.

2. The Sub Court, Tirupattur.

3. The III Additional District Court,
Tirupattur.

4. The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.17152
+1cc to Mr.S.Arunkumar, Advocate, S.R.No.18413

C.M.A.No.519 of 2015
and M.P.No.1 of 2015

PP(CO)
CS/16/08/2021